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No. 04-390

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY ROSSO,

Petitioner,

v.

THE A.I. ROOT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The A.I. Root Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner Anthony Rosso, Respondent A.I. Root's former Materials Manager, was terminated in June, 2000 for economic reasons. Six and one-half months earlier, on November 15, 1999, John Root, President of A.I. Root, and Brad Root, a Vice President, had met with then Chief Operating Officer Bob Stanners to discuss Mr. Rosso's performance. John Root wanted to terminate Mr. Rosso because of job performance, but Mr. Stanners convinced him not to do it. Mr. Rosso claims that Mr. Root also said he heard rumors that Rosso had memory problems, asked when he was going to retire, and made an allusion to early Alzheimer's. It is undisputed that at the meeting Mr. Stanners asked for, and John Root approved, $20,000 in new software and training to assist Mr. Rosso with his job and help his performance. He was eventually let go by his supervisor, Manufacturing Manager Sandy Singer, as part of corporate cutbacks in June, 2000.

Both the District Court [Pet. App. 19-20, 22-23] and the Court of Appeals [Pet. App. 4, 7] determined that John Root's alleged comments were not direct evidence of discrimination as a matter of law, and that Mr. Rosso was terminated for legitimate, non-discriminatory reasons, i.e., an economic reduction in force [Pet. App. 2, 16].

Mr. Rosso makes two arguments in support of his Petition for a Writ of Certiorari. First, that the Sixth Circuit disregarded its own binding precedent concerning direct evidence and, second, that the opinion below "enhanced a split among the federal circuits as to the meaning of direct evidence" [Pet. 4-5]. Yet the Question Presented for Review [Pet. i] appears to be the identical question of fact and law

presented below: did the Petitioner meet his burden of producing sufficient admissible evidence of discrimination to warrant a jury trial. This is not a question that merits this Court's plenary review.

PETITIONER'S MISSTATEMENTS OF FACT AND INCORRECT CHARACTERIZATIONS OF THE RECORD

Pursuant to Sup. Ct. R. 15.2, Respondent respectfully points out to this Court the following instances where it perceives that Petitioner has incorrectly stated the facts or did not correctly state the record.

1. Petitioner misstates the Sixth Circuit's holding when he claims that the "Panel concluded that these statements were *no longer* direct evidence because of the passage of six months time between the statement and the termination." [Pet. 4, 13] (emphasis added). Rather, the court of appeals held that the alleged comments were "insufficient by themselves to be direct evidence of discrimination." [Pet. App. 5]. The Panel never determined that the comments were once direct evidence and then became stale.

2. Petitioner incorrectly claims that the Sixth Circuit determined that the comments were not direct evidence "based solely on the passage of time . . ." [Pet. 4]. Several more factors played a part in this ruling. The Panel also found that "John's remarks were too isolated and ambiguous," and went on to say that "[t]here is no evidence that John subsequently communicated any discriminatory animus to Singer [the decisionmaker]." [Pet. App. 5].

3. Petitioner improperly characterizes John Root as the "decisionmaker" in his Question Presented for Review and

perpetuates that mistake throughout his argument. The record shows that it was Mr. Singer, Petitioner's supervisor, who "decided independently that Rosso should be let go in view of the economics [and] communicated that decision to John, who deferred to Singer's judgment." [Pet. App. 5]. The Panel specifically noted that John Root "did not make the decision to terminate Rosso." [Pet. App. 5].

4. Petitioner incorrectly states repeatedly that the Panel Opinion created a "bright-line rule" in which a six-month lapse of time acts as a bar to the consideration of direct evidence. [Pet. 2, 4, 11, 15]. Nowhere in the opinion below does the Sixth Circuit announce a bright-line test of any kind.

5. Petitioner incorrectly states that the record reflects "the express statement by the Owner and President of the company that he wanted Plaintiff terminated because of his age and factors consistent with a perceived disability." [Pet. 4]. Throughout his brief, Petitioner repeats the misstatement that John Root said he wanted to fire Petitioner "because he was old." [Pet. 3, 4, 13]. The actual comments attributed to John Root are cited in full at Pet. 3 and contain the following exchange between Mr. Stanners and Mr. Root: "[John Root] looked me straight in the eye and said, I want you to fire Tony Rosso. I asked why, and he said job performance. . . ."

6. Petitioner's references to a jury award received by former A.I. Root Company employee Stanners in a separate lawsuit should be stricken and disregarded from Petitioner's brief. Neither the verdict nor any other aspect of that case

was part of the record below. Fed. R. App. P. 10(a) provides that:

> [t]he following items constitute the record on appeal:
>
> (1) the original papers and exhibits filed with the district court;
>
> (2) the transcript of the proceedings, if any; and
>
> (3) a certified copy of the docket entries prepared by the district clerk.

A jury verdict in an entirely different lawsuit brought by a co-worker, rendered eight months after the district court granted summary judgment in the instant case, could not possibly be part of the "original papers and exhibits" in this case.

Petitioner makes no attempt to vouch for the authority or admissibility of this out-of-record reference in his brief. Although not presented to the court or the parties as such, it would not qualify as a "supplemental authority" either, under Fed. R. App. P. 28(j). Rule 28(j) only allows a party to bring new authorities to the attention of the court. It is not designed to bring in new evidence through the back door. *Trans-Sterling, Inc. v. Bible,* 804 F.2d 525, 528 (9th Cir. 1986).

REASONS FOR DENYING THE PETITION

The Writ should be denied for several reasons. Contrary to Petitioner's claim, the decision below followed controlling Sixth Circuit precedent; Petitioner has waived any argument attacking the applicable precedent by his own prior judicial admissions; Petitioner never raised the issue of conflicting definitions of direct evidence at any stage below; this petition merely seeks an advisory opinion; there is no compelling reason to grant a Writ where the claimed error consists of the misapplication of a properly stated rule of law (Sup. Ct. R. 10).

I. The Panel Followed Binding Sixth Circuit Precedent Defining Direct Evidence in Discrimination Cases.

Petitioner first claims that "[t]he Panel disregarded binding precedent of the Sixth Circuit . . ." and cites the Panel's definition of direct evidence without explaining what specific precedent was ignored [Pet. 4-5]. The Panel relied on *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*), which defines direct evidence as "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." [Pet. App. 5], (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). In *Wexler*, the Sixth Circuit held that the plaintiff had presented direct evidence of age discrimination, because the alleged discriminatory comments "were made by the decisionmaker, indicated a belief that a person's capabilities as a store manager diminish with age, and the first five [alleged age biased comments] were directed at Wexler at the very time he was being demoted." *Wexler*, 317 F.3d at 572. The Sixth Circuit properly relied on three

legitimate factors: that the comments were made by a decisionmaker, that they were made in reference to the adverse employment decision and were made at or near the time of that adverse employment decision. *Id.*

The Panel below used that same analysis in determining that Mr. Rosso failed to adduce direct evidence of age and disability discrimination. Both Petitioner and the Panel acknowledged that a plaintiff may rely on direct or circumstantial evidence, or both, in proving age and disability claims [Pet. App. 3]. Mr. Rosso made it clear that he was proceeding only on a theory of direct evidence [Pet. App. 3; Reply Brief 5]. It consisted solely of John Root's comments at the November 15, 1999 meeting. Consistent with the Sixth Circuit's definition of direct evidence, the Panel concluded that there were five reasons why the Root comments were not direct evidence of age or disability discrimination: 1) Root was not the decisionmaker; 2) the comments were not made in the context of the adverse employment decision; 3) the comments were not made at or near the time of the adverse employment decision but six and a half months earlier; 4) the comments were stray, isolated and ambiguous remarks; 5) Root's conduct in investing $20,000 in training for Petitioner immediately following the comments negated any inference of animus [Pet. App. 4-7]. In addition, the Panel correctly found that Petitioner failed to demonstrate that the Respondent's proffered reason – an economic driven reduction in the workforce – did not actually motivate the discharge [Pet. App. 4-7].

II. Petitioner Has Waived Any Argument Concerning the Applicable Controlling Definition of Direct Evidence.

Petitioner never raised the issue of conflicting definitions among the circuits at any stage below. In fact, Petitioner admitted in his brief to the Sixth Circuit, at p. 14, "However, though correctly identifying the case law which applied to a direct evidence case, the Court failed to grant any inference in favor of Anthony Rosso." Mr. Rosso did not claim the district court applied the wrong law, but that its application to the facts of his particular case reached the wrong conclusion. This is the same argument made in this petition.

The district court's definition of direct evidence, which Petitioner agrees is correct, is found at p. 5 of its Memorandum Opinion: "Direct evidence is defined as evidence in which, if it is believed, would prove the existence of a fact (i.e., unlawful discrimination) without any inferences or presumptions." [Pet. App. 15]. In his brief to the Sixth Circuit, petitioner urges the same definition at p. 15 and cites *Wexler, supra*, and *Jacklyn, supra*. The Sixth Circuit's opinion also recites and relies on the same controlling cases and the exact same definition of direct evidence [Pet. App. 3-4]. There was no conflict or confusion. Petitioner was satisfied that his evidence was tested by the correct definition of direct evidence.

Prior to this petition there was never any discussion or argument in any pleading by either party or the opinion of either court in this case concerning conflicting definitions of direct evidence.

III. This Petition for a Writ of Certiorari Merely Seeks an Advisory Opinion.

The major portion of Petitioner's legal argument is devoted to a legal analysis of various approaches to direct evidence that has nothing to do with this case. [Pet. App. 4-11]. Petitioner begins with the historical development of the mixed-motive versus pretext framework for proving discrimination, beginning with *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The brief then goes into a lengthy analysis of circuit court decisions that turn on the direct evidence burden in mixed-motive disparate treatment cases.

Petitioner posits that in defining direct evidence (in mixed-motive cases) the federal courts of appeal are split into three distinct groups: those using the "classic" definition; those using an "animus" definition; and those using an "animus-plus" definition. Petitioner fails to attribute this very analysis to its source, Circuit Judge Selya, the author of *Fernandes v. Costa Bros. Masonry,* 199 F.3d 572, 581 (1st Cir. 1999). Tracking Judge Selya's examples of these three schools of thought, Petitioner travels the same road among the circuits, citing the same cases. These cases began with a single premise, that a plaintiff must present direct evidence of discrimination in order to prove a mixed-motive employment discrimination case. The disagreement among the circuits involved the quality of that direct evidence in mixed-motive cases. This conundrum was eliminated by this Court's decision in *Desert Palace v. Costa,* 539 U.S. 90 (2003) which declared that direct evidence was not required. *Fernandes* has been abrogated. *Id.*

Whether or not there will be confusion between the mixed-motive framework and the pretext framework in future

cases is, for now, the grist for law review authors to grind. See, e.g., Jennifer R. Gowans, Note, *Plaintiffs' Direct Burden in Mixed-Motive Disparate Treatment Cases: An Analysis in Light of Costa v. Desert Palace*, 54 CASE W. RES. L. REV. (2003).

This case does not present a record that implicates any confusion or conflict about the definition of direct evidence. What is more, Petitioner has totally ignored the fact that this case was treated by the district court and the circuit court as a reduction-in-force termination, guided by different burdens. [Pet. App. 6, citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)]. No error in this regard is claimed by Petitioner. None of the cases belonging to any one of the three categories of circuits discussed by Petitioner was a workforce reduction termination. In short, Respondent respectfully suggests that the Petitioner is actually seeking an advisory opinion. He now appears to be looking for a new one-size-fits-all definition of direct evidence, when in reality, he was content with the definition used at every stage of his case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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